84-408

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CASE NUMBER

84-408

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1984 TERM

CLEAR-VIEW CABLE T.V., INC.,
APPELLANT,

VS

TOWN OF NARROWS,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

JURISDICTIONAL STATEMENT

COUNSEL FOR APPELLANT
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I. QUESTIONS PRESENTED BY THIS APPEAL

The questions presented by this appeal are:

1. DID THE VIRGINIA SUPREME COURT APPLY THE PROPER LEVEL OF SCRUTINY TO A TOWN ORDINANCE TERMINATING A CABLE TELEVISION FRANCHISE.
2. DID A TOWN ORDINANCE TERMINATING A CABLE TELEVISION FRANCHISE VIOLATE THE FRANCHISEE'S ARTICLE 1, SECTION 10 CONSTITUTIONAL RIGHTS.

II. THE PARTIES TO THIS PROCEEDING ARE NAMED IN THE CAPTION TO THIS ACTION

III. and IV. THE TABLE OF CONTENTS AND TABLE OF AUTHORITIES FOLLOW THIS PAGE

V. CITATION TO OPINION OF COURT BELOW

As of the writing of this Jurisdictional Statement, the opinion of the Virginia Supreme Court has not been printed in the Virginia Reports or the Southeastern Reporter.

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V. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) The nature of the proceeding is an appeal from a judgment of the Supreme Court of Virginia. The judgment of the Supreme Court of Virginia reversed a ruling by the Circuit Court of Giles County. The Circuit Court ruling declared invalid an ordinance enacted by the Town of Narrows cancelling the cable television franchise owned by Clear-View Cable T.V., Inc. Left undisturbed, the effect of the ruling of the Virginia Supreme Court is to terminate Clear-View's operations in the Town of Narrows.

(ii) The date of the judgment of the Virginia Supreme Court is April 27, 1984. The order of the Virginia Supreme Court denying Clear-View's petition for rehearing is dated June 15, 1984. On

June 19, 1984, Clear-View filed with the Virginia Supreme Court, pursuant to Rule 5:56 of the Rules of Court, Supreme Court of Virginia, its notice of intention "to file an appeal with the Supreme Court of the United States or seek a writ of certerani from that court ..." Rule 5:56, Rules of Court, Supreme Court of Virginia. On July 12, 1984 the Supreme Court of Virginia deferred issuance of its mandate and allowed Clear-View until September 13, 1984 to docket the case with the United States Supreme Court and upon such docketing the issuance of the mandate is deferred until final determination of the case by the Virginia Supreme Court.

(iii) The Jurisdiction of the United States Supreme Court in this case is provided by 28 U.S.C. §1257 which states in pertinent part as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be

had, may be reviewed by the Supreme Court as follows:

(1) . . .

(2) By appeal, where is drawn in question the validity of a statute if any state on the ground of its being repugnant to the Constitution treaties or laws of the United States, and the decision is in favor of its validity.

(3) . . .

The decisions of this Court clearly hold that the reference in Section 1257(2) to a "statute of any state" includes every legislative action to which a state gives the force of law, including municipal ordinances and bylaws. See, Erznoznik v. City of Jacksonville, 422 U.S. 205, 45 L.Ed. 2d 125(1975) ("A local ordinance is deemed a state statute for purposes of invoking this court's jurisdiction under 28 U.S.C.§ 1257(2)."), Coates v. City of Cincinnati,402 U.S. 611, 29 L.Ed. 2d 214 (1971); Paulos v. New Hampshire, 345 U.S.

395, 402, 97 L.Ed 1105 (1953); Independent Warehouses v. Scheele, 331 U.S. 70, 79, 91 L.Ed. 1346 (1947); Jamison v. Texas, 318 U.S. 413, 414, 87 L.Ed. 869 (1943); King Mfg. Co. v. City Council of Augusta, 277 U.S. 100, 72 L.Ed. 801 (1928); Williams v. Buffy, 96 U.S. 176, 183, 24 L.Ed. 716 (1878).

The decisions of this Court also clearly hold that the validity of a state statute is said to have been upheld when a state court finds the statute to be consistent with the Constitution, treaties, or laws of the United States. Guss v. Utah Labor Board, 357 U.S. 1, 5-6, 2 L.Ed. 2d 1097 (1958); Bethlehem Steel v. New York Labor Relations Board, 330 U.S. 767, 91 L.Ed. 1234 (1947). In this case the appellant, Clear-View Cable T.V., Inc., raised the constitutional challenge in the Supreme Court of Virginia. On pages 18 and 19 of

Clear-View's brief in the Supreme Court of Virginia this point was discussed and specifically addressed. Such discussion included the following:

> By revoking and cancelling Clear-View's franchise, the Town of Narrows has impaired Clear-View's property right in its franchise, impaired the contractural obligation between itself and Clear-View, and has attempted to deprive Clear-View of the franchise property rights without due process of law. The Circuit Court executed its constitutional duties when it reviewed the town's actions and enjoined the town from enforcing its ordinance.

Thus, it is clear that Clear-View did raise the issue to the Virginia Supreme Court. The fact that the Virginia Supreme Court failed to articulate its recognition of the issue is not fatal to jurisdiction in this Court. It is not necessary that the state court be explicit as to the grounds for overruling a timely challenge to a statute, so long as the Federal grounds were properly raised in the Court below. Lagert v. Texas, 318

U.S. 418, 87 L.Ed. 873 (1943); Lawrence v. State Tax Commission, 286 U.S. 276, 282-283, 76 L. Ed. 1102 (1932)

VI. CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES INVOLVED

This case involves an ordinance adopted by the Town Council of the Town of Narrows. The ordinance cancelled and terminated a franchise granted Appellant, Clear-View Cable T.V., Inc., to operate a cable television system in the town. The ordinance is set forth in full in the appendix as directed by Rule 15 (f) of the Rules of the Supreme Court of Virginia.

This case also involves the "contract clause" of the United States Constitution. Article 1, Section 10 of the United States Constitution provides:

> No state shall enter any treaty, alliance, or confederation, grant letters of Marcue and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

VII. STATEMENT OF THE CASE

References in parentheses are to the page number of the Appendix in the Virginia Supreme Court. This appendix is a part of the record in the Supreme Court of Virginia.

Appellee, Town of Narrows, filed a petition for Writ of Mandamus on September 19, 1980, (App. 39), in the Circuit Court of Giles County, Virginia against Clear-View Cable T.V., Inc., praying that Clear-View cease operation of its franchise cable television system in the Town of Narrows, Giles County, Virginia.

Appellant, Clear-View Cable T.V., Inc., filed a Bill for Injunctive Relief (App. 44) against the Town of Narrows, Virginia, and the Town's mayor and council members praying that the action of the Town of Narrows revoking Clear-View's franchise be permanently enjoined.

The Town of Narrows filed its answer to the Bill for Injunctive Relief on September 25, 1980. (App. 42). Clear-View filed its answer to the Petition for Writ of Mandamus on October 1, 1980 (App. 47), denying the legality and propriety of the actions of the Town of Narrows in attempting to terminate Clear-View's ten-year (10) franchise agreement with the Town, and praying that the Petition be dismissed.

The two matters were joined by the Circuit Court of Giles County for purposes of hearing. On October 14, 1980, the Circuit Court entered an order, after taking evidence ore tenus, restraining and enjoining the Town of Narrows, Virginia, its Mayor and Town Council Members from cancelling or terminating the franchise held by Clear-View until further order of the Court. (App. 147). The Circuit Court further took under

advisement the Petition for Writ of Mandamus filed by the Town of Narrows.

After receiving legal memoranda submitted by counsel for the parties, the Circuit Court conducted hearings on January 23, 1981 (App. 149), February 27, 1981 (App. 294), and March 9, 1981 (App. 328), the Circuit Court hearing extensive evidence ore tenus at those hearings.

On June 29, 1981, the Circuit Court of Giles County entered its final order denying the petition for Writ of Mandamus and ruling in favor of Clear-View (App. 338). To this action, the Town of Narrows has took an Apppeal to the Virginia Supreme Court. The Supreme Court of Virginia awarded the Town a writ of error and on April 27, 1984 reversed the Circuit Court judgment and, in effect, ruled in favor of the Town and against Clear-View. On June 15, 1984, the Supreme Court of Virginia denied

Clear-View's petition for rehearing.

Clear-View Cable T.V., Inc., (Clear-View) operates a Community Antenna Television System (CATV) in the Town of Narrows, Virginia, hereinafter referred to as the Town, by grants of franchise on April 9, 1968, and January 1, 1976 (App. 1, 9). The CATV system has over 900 subscribers. The franchise agreement dated January 1, 1976, was for a period of ten (10) years.

By notice to Clear-View and its president, Mr. Harry Anglin, dated August 12, 1980, the Narrows Town Council called a special meeting of the Town Council for September 15, 1980, "to consider the passage of an ordinance terminating and cancelling your (Clear-View's) franchise". (App. 49). Mr. Anglin attended the meeting without counsel. At this meeting, certain town residents voiced displeasure with Clear-View's service and picture

quality. Other participants from outside the corporate limits of the Town had no complaints about Clear-View's service and picture quality. At the outset of the special meeting, Narrows' Mayor Donald Richardson stated, "The purpose of the meeting tonight is to give Mr. Anglin a chance to explain to us why we sould not terminate his contract." (App. 54). Councilwoman Thornton initiated comments about Clear-View's service by stating that she and other unspecified residents had many complaints about reception. (App. 56-59). Later in the meeting Mayor Richardson stated, "We are here tonight to hear from people who have the cable and are dissatisfied." (App. 129-130). Throughout the course of the meeting, four of the five Town Council members expressed dissatisfaction with Clear-View's service.

At various points in the meeting, several public participants inquired

whether another cable television company was prepared to take-over Clear-View's operations should the Town Council revoke Clear-View's operations should the Town Council revoke Clear-View's franchise. Mayor Richardson, Town Manager Heatwole, and Town Attorney Cornwell each stated that there were no other cable television companies prepared to take over Clear-View's operations at that time. Town Attorney Cornwell stated, "There are no definite plans for another franchise to come in," and, "To my knowledge, nobody else wants to come in here." (App. 61-62, 66). Town Manager Heatwole reported that if Clear-View's franchise were revoked, and it chose not to sell its operation, a "considerable period of time," estimated at six (6) months, could elapse before another company could completely duplicate Clear-View's facilities. (App. 69-70). Replying to a participant's inquiry as to

ticipant's inquiry as to whether a new cable company would provide service outside the Narrows corporate limit as Clear-View was then doing, Mayor Richardson stated, "At this time we can give you no guarantee whatsoever." (App. 96).

At the conclusion of comments by the public participants and Council members, the Council adjourned into executive session. When the Council reconvened into regular session forty (40) minutes later, Councilman Plummer immediately made a motion to revoke Clear-View's franchise and to order Clear-View to immediately cease its operations within the Town of Narrows. The motion was seconded and passed unanimously without any discussion or further comment. (App. 135-139).

Clear-View filed a Bill for Injunctive Relief, and the Town filed a

before Judge Robert L. Powell in the Circuit Court of Giles County during which the Court considered the matters of notice, the conduct and tenor of the meeting of September 15, 1980, the number of meeting participants, the apparent personality conflict between the Clear-View president and members of Town Council, the technical performance of the Clear-View CATV system in Narrows, and the effect of the cancellation of the franchise on Clear-View and the over 900 CATV subscribers in the Town of Narrows.

After considering the above, the Circuit Court found the notice to be vague, the findings of fact to be conclusions only, and the revocation of the franchise to be drastic, unreasonable, arbitrary, and without thought to the effects on Clear-View and the citizens of Narrows. The Writ of Mandamus was denied, and final order was entered June

Narrows. The Writ of Mandamus was denied, and final order was entered June 29, 1981.

As previously noted in this Jurisdictional Statement, the impairment of Contract issue was raised in the Supreme Court of Virginia. (See pp. 17 and 18, Appellee's Brief, Supreme Court of Virginia, Town of Narrows v. Clear-View Cable TV, Inc., Record No. 811452, Supreme Court of Virginia) The value of Clear-View's contract right and its right to protection by the Courts was argued orally before the Trial Court and the Trial Court's opinion reflects that Clear-View's proprietary interest in its contract (franchise) rights was raised in the Trial Court. Even if it were not specifically and expressly raised in the Trial Court, Clear-View prevailed in the Trial Court and the issue was expressly raised in writing in the Virginia Supreme Court.

VIII. STATEMENT AS TO WHY THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION, WITH BRIEFS ON THE MERITS AND ORAL ARGUMENT, FOR THEIR RESOLUTION.

In this case, the Virginia Supreme Court clearly applied the wrong level of scrutiny to the basis for the legislative enactment challenged herein. Not only would a full review of this case redress the litigant's individual grievance (valued at somewhere in the $400,000 to $500,000 range) but would also clarify the level of scrutiny required and the kind of factual basis necessary to allow a municipality to cancel and terminate a cable television franchise.

In the instant case, as in any contracts clause case, the threshold inquiry is "whether the state law has, in fact, operated as a substantial impair

ment of a contractual relationship." Energy Reserves v. Kansas Power and Light, _____ U.S. _____, 74 L.Ed. 2d 569, 580, 103 S.Ct. 697(1983). As it relates to the instant case, this inquiry is a two-pronged question: First, did the franchise create the kind of contractual relationship between Clear-View and the Town that is protected by the contracts clause of the Constitution? And second, did the September 15, 1980 ordinance "substantially impair" that relationship?

The answer to the first question is in the affirmative. This Court has recognized that the grant of a franchise by a state or any of its sub-divisions when accepted and acted on by the grantee does create a contractual relationship. New York Electric Lines Co. v. Empire City Subway Company of N.Y., 235 U.S. 179, 59 L.Ed. 184 (1914). Moreover, this relationship is entitled to constitu-

tional protection under Article 1, Section 10 of the United States Constitution. United States Trust Co. v. New Jersey, 431 U.S. 1 52 L.Ed. 2d 92 (1977); Russell v. Sebastian, 233 U.S. 195, 58 L.Ed. 912 (1914); Southern Bell Tel. & Tel. Co. v. City of Meridian, 154 F. Supp. 736 (S.D. Miss. 1957); Allied Structural Steel Co. v. Spannus, 438 U.S. 234, 241, 57 L.Ed. 2d 727, 734 (1978). In Allied Structural Steel this Court stated:

> Although it was perhaps the strongest single constitutional check in state legislation during our early years as a Nation, the Contract Clause receded into comparative desuetude with the adoption of the Fourteenth Amendment, and particularly with the development of the large body of jurisprudence under the Due Process Clause of that Amendment in modern constitutional history. Nevertheless, the Contract Clause remains part of the Constitution. It is not a dead letter.

Based on the foregoing, it is submitted that it is firmly established that a

cable television franchise grant, such as that in the instant case, creates a contractual relationship within the purview of the contract clause of the Constitution of the United States.

The second prong of the inquiry is whether there has been an impairment of the constitutionally protected contractual relationship. It would be difficult to imagine how one's contractual relationship could be any more impaired than by cancellation and termination of the relationship. If this does not "impair" it in a constitutional sense, it is difficult to conceive of what would. Any enactment which renders a contract in itself less valuable or less enforceable impairs the contract. Edwards v. Kearzey, 96 U.S. 595, 24 L.Ed. 793 (1878).

Thus, it is apparent from the numerous precedents of this Court,

Clear-View has a constitutionally protected contractual relationship with the Town of Narrows and the ordinance terminating that franchise "impairs" that relationship.

The crucial question, of course, is whether the Virginia Supreme Court used the proper standard of review in determining whether there had been an impairment. The opinion of the Virginia Supreme Court, in a nutshell, was grounded on the theory that if the issue before Town Council was "fairly debatable" the decision of Town Council is unassailable. The following quotation from the opinion of the Supreme Court of Virginia in this case is illustrative of this point.

> When, as here, evidence of unreasonableness is met with evidence of reasonableness, a classic case of a 'fairly debatable' issue is presented. Under these circumstances, it is the legislative body, and not the Court, which has the prerogative to decide the issue. See Fairfax County v. Jackson, 221 Va. 328, 335,

> 269 S.E. 2d 381, 386 (1980). Because the issue is fairly debatable, the legislative judgment must stand. Thus it follows that the trial court usurped the legislative prerogative in reversing Council's action. Id., 269 S.E. 2d at 386. We have considered both operative presumptions and conclude that the trial court erred in deciding council's action was unreasonable, arbitrary and capricious.

The Virginia Supreme Court's logic and reasoning in utilizing the "fairly debatable" standard flies in the face of this Court's precedents to the contrary.

This Court has elucidated the required level of scrutiny in such cases in two recent decisions. See United States Trust Co. v. New Jersey, 431 U.S. 1, 52 L. Ed. 2d 92 (1977) and Allied Structural Steel Co. v. Spannus, 438 U.S. 234, 57 L.Ed.2d 727 (1978).

In United States Trust, this Court held that New Jersey could not retroactively alter a statutory bond covenant relied upon by bond purchasers. The

Court held that once a statute is found to impair a valid public contract, it should be upheld only if "reasonable and necessary to serve an important public purpose." United States Trust, 431 U.S. at 25. The Court held that a statute was "reasonable" under such circumstances only when it was prompted by unforseen changed circumstances, Id. at 31-32 and "necessary" only when it was the least drastic means of achieving a desired and legal end. Id. at 29-30.

In Allied Steel this Court invalidated a Minnesota statute requiring that an employer who closed its office in the state must pay a "pension funding charge" if its pension fund at the time was insufficient to provide full benefits for all employees with at least ten years' seniority. The factors which seemed significant to this Court in Allied Steel were: (1) the suddenness and permanence

of the impairment caused by the statute, (ii) the narrowness of the classes benefited and burdened by the State's actions; (iii) the degree of description of private contract-based expectations; and (iv) the importance of the public ends furthered by the challenged legislation.

A comparison of Allied Steel with United States Trust reveals that the Court in Allied Steel employed a standard of review for private contract impairment cases as strict as that employed in United States Trust for public contracts. These two cases clearly create what one commentator has appropriately and accurately described as a "sheltered 'enclave' into which state legislatures may not intrude unless public necessity compells them to do so. Note, Rediscovering the Contracts Clause, 97 Harv. L. Rev. 1414 (1984).

The analysis of the decision of the Virginia Supreme Court in the instant case reveals that the Virginia Supreme Court did not properly scrutinize the situation. The Supreme Court of Virginia used the "fairly debatable" test which is, quite simply, inappropriate in contract clause cases. Virginia has used the "fairly debatable," test since the 1920's. See Martin v. City of Danville, 148 Va. 247, 138 S.E.(1927). Its use has been restricted almost entirely to zoning regulation cases. See also, Fairfax County v. Jackson, 221 Va. 328, 269 S.E.2d 381 (1980); Fairfax County v. Williams, 216 Va 49, 216 S.E.2d 33 (1975); Fairfax County v. Snell Corp. 214 Va 665, 220 S.E.2d 889 (1974); Board of Supervisors v. Carper, 200 Va 653, 107 S.E.2d 390 (1959); Fairfax County v. Parker, 186 Va 675, 44 S.E.2d 9 (1947); West Brothers Brick Co. v. Alexandria,

169 Va 271, 192 S.E.881 (1937).

This "fairly debatable" test, while it may be appropriate in zoning cases has no place in interpretation of the contract clause of the United States Constitution. The "fairly debatable" standard for review is far less stringent than the standards set forth in this Court's decisions in United States Trust and Allied Steel. The "fairly debatable" test is another version of what the United States Supreme Court has called its minimal rationality standard. See eg., Williamson v. Lee Optical, 348 U.S. 483, 99 L.Ed. 563 (1955). Under this standard, if a state can point to any "state of facts that can reasonably be conceived to constitute a distinction, or difference in State policy . . ." then the state action will be held valid. Allied Stores v. Bowers, 3584 U.S. 522, 3 L.Ed. 2d 480(1959). However, this minimal

standard of review is inappropriate when contractual impairments are at issue. Indeed, this Court has recently pointed out in Energy Reserves v. Kansas Power and Light, ____ U.S. ____, 74 L.Ed 2d 569 (1983), that when a "state is a party to the contract 'complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the state's self-interest is at stake.'" In such cases, therefore, the appellate court must apply a heightened standard of review.

Since the Virginia Supreme Court applied such a deferential standard of review to the Town's ordinance, the Virginia Supreme Court never reached the real issue, which was: could the ordinance withstand Constitutional challenge?

If the Virginia Supreme Court had applied the appropriate "heightened" standard of review set forth and mandated

by United States Trust and Kansas Power and Light, the Town Council's ordinance could not have passed constitutional muster. Certainly, difficulties with poor television reception were common and long-standing problems in the western, mountainous regions of the state. It was with full knowledge of this problem that the Town renewed Clear-View's charter for a ten-year contract. Clearly, no sudden emergency justified the Town's actions. Not only does the instant case fail to meet the sudden emergency logic or analysis but it also fails to meet the "necessary" test. In United States Trust, the Court held that an impairment is "necessary" only when it is the least drastic means to a given end. Id. at 21-31.

Certainly, in the instant case, some action less drastic than termination could have been taken. It is not

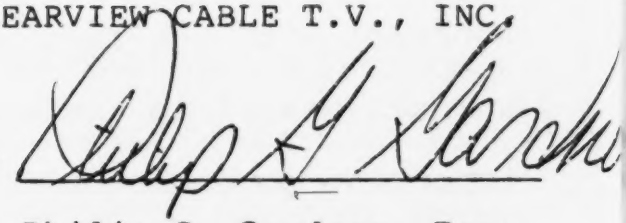
entirely clear what legal purpose the Town Council sought to achieve by termination of the franchise. By its own admission, Council had not fully studied the alternatives carefully, nor had it developed a plan to encourage other cable companies to enter the area. In summary, it is not possible to say, as a matter of law, that the termination of Clear-View's franchise and the impairment of its contract with the Town was "reasonable and necessary" to the achievement of important governmental interests.

IX. CONCLUSION

For the reasons stated and on the grounds set forth, the appellant, Clear-View, respectfully prays that jurisdiction be noted in this case and the case set for plenery review.

Respectfully Submitted,

CLEARVIEW CABLE T.V., INC.

by 

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CERTIFICATE

I, Philip G. Gardner, a member of the Bar of the Supreme Court of the United States, do hereby certify that on September 11, 1984, I mailed, postage prepaid, three copies of this Jurisdictional Statement to James E. Cornwell, Jr., Attorney at Law, Pearisburg, Virginia, counsel of record for appellee, the Town of Narrows, Virginia.

This 11 day of September, 1984.

Philip G. Gardner, Esq.

Philip G,. Gardner, Esq.
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OCTOBER 1984 TERM

CLEAR-VIEW CABLE T.V., INC.,
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VS

TOWN OF NARROWS,
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ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

APPENDIX

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SUPREME COURT OF VIRGINIA
SUPREME COURT BUILDING
RICHMOND, VIRGINIA 23219

CERTIFICATE

I, Allen L. Lucy, Clerk of the Supreme Court of Virginia, do hereby certify that attached hereto are the following papers contained in the record of the case Town of Narrows v. Clear-View Cable TV, Inc., Record No. 811452: (1) Opinion rendered on April 27, 1984, by Justice A. Christian Compton; (2) Order denying petition for rehearing entered on June 15, 1984; (3) Notice of appellee that it will seek writ of certiorari from the Supreme Court of the United States.

Given under my hand and seal this 31st day of August, 1984.

/s/ Allen L. Lucy
Allen L. Lucy, Clerk
Supreme Court of
Virginia

PRESENT: All the Justices

TOWN OF NARROWS

v. Record No. 811452

CLEAR-VIEW CABLE TV, INC.

OPINION BY JUSTICE A. CHRISTIAN COMPTON
April 27, 1984

FROM THE CIRCUIT COURT OF GILES COUNTY
Robert L. Powell, Judge

This appeal stems from a municipality's revocation of a franchise granted the operator of a community antenna television (CATV) system.

In 1976, appellant Town of Narrows, by appropriate ordinance, granted a 10-year franchise to appellee Clear-View Cable TV, Inc., to operate a CATV system in the Town. Because of citizen complaints about the quality of service rendered by Clear-View, the Town Council called a special meeting and held a public hearing in September of 1980 to

consider terminating the franchise. Following the meeting, Council unanimously adopted an ordinance revoking the franchise "immediately."

Because Clear-View failed to cease operations, the Town instituted the present proceeding four days after Council's action by filing a petition for a writ of mandamus, as authorized by Code § 15.1-315.[1] The Town asked that a writ be issued compelling

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[1] As pertinent here, § 15.1-315 provides that "the circuit courts of the counties in which towns may be situated shall have jurisdiction by mandamus, according to the provisions of [Chapter 25 (§ 8.01-644 to -653) of Title 8.01], to enforce compliance by the . . . towns and by all grantees of franchises . . . with all the terms and contracts and obligations of either party, as contained in franchises."

Clear-View to comply with the franchise agreement and to cease immediately the use of public places of the Town. On the same day, Clear-View filed a bill for injunction in the trial court seeking an order staying the effect of the revocation ordinance. Within a month, the court entered an order restraining the Town from terminating the franchise. Following ore tenus hearings in January and February of 1981, the trial court denied the request for mandamus. We awarded the Town an appeal from the June 1981 final order in the mandamus proceeding.[2]

The 1976 franchise ordinance (hereinafter, the franchise), which renewed a prior franchise awarded Clear-View in 1968, allowed the company as "grantee" to use the streets and other public places of the Town for the company's poles, wires, conduits, cables and fixtures to construct, install, operate, and maintain a CATV

service in and along the streets, alleys, and other public places in the Town. The franchise also provided, in part:

> "Sec. 9. Operation and Maintenance of the System. Complaints.
>
> (a) The grantee shall render efficient service, make repairs promptly, and interrupt service only for good

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[2]The Town's petition for appeal was granted in April of 1982. The trial court entered an order a month later in this case at the request of counsel for both parties. The order, noting a previous agreement to consolidate the mandamus and injunction proceedings, purported to consolidate the matters in the trial court nunc pro tunc, to supplement the record in this appeal to include pleadings in the injunction suit, and to consolidate the cases in this Court. Such action was beyond the trial court's authority. When, as here, the record on appeal has been transmitted in compliance with Rule 5:15 by the clerk of the trial court to the clerk of this Court and an appeal has been awarded, the record on appeal cannot be enlarged except upon our grant of a writ of certiorari under Code § 8.01-673. Old Dominion Iron & Steel Corp. v. VEPCO, 215 Va. 658, 212 S.E.2d 715 (1975). No request was made for certiorari. Thus, we will take no further notice of the injunction proceeding.

cause and for the shortest time possible. Such interruptions, insofar as possible, shall be preceded by notice and shall occur during period of minimum use of the system.

(b) The grantee shall maintain an office in Giles County, Virginia, which shall be open during all usual business hours, have a listed telephone, and be so operated that complaints and request for repairs or adjustments may be received at any time during usual business hours. During evening hours up to 11PM and during weekends and holidays from 8AM to 11 PM that complaints may be received at an advertised telephone number.

. . . .

"Sec. 15. Safety Requirements.

. . . .

(d) The grantee shall maintain a force of one or more resident agents or employees at all times and shall have sufficient employees to provide safe, adequate, and prompt service for its facilities.

. . . .

"Sec. 26. Forfeiture of Franchise.

(a) In addition to all other

rights and powers pertaining to the Town by virtue of this Franchise or otherwise, the Town reserves the right to terminate and cancel this Franchise and all rights and privileges of the grantee hereunder in the event that the grantee:

(1) Violates any provision of this Franchise or any rule, order, or determination of the Town or Town Council made pursuant to this Franchise, except where such violation . . . is without fault or through excusable neglect;

. . . .

(4) Attempts to evade any of the provisions of this Franchise or practices any fraud or deceit upon the Town;

(b) Such termination and cancellation shall be by ordinance duly adopted after thirty (30) days notice to the grantee and shall in no way affect any of the Town's rights under this Franchise or any provision of law. In the event that such termination and cancellation depends upon a finding of fact, such finding of fact as made by the Town Council or its representative shall be conclusive. Provided, however, that before this Franchise may be terminated and cancelled under this Section, the grantee must be provided with an opportunity to be heard before the Town Council."

During the period 1976-1980, according to minutes of Council meetings, numerous complaints about the operation and maintenance of the cable system were received by Council members and the Town Manager. These complaints were communicated to C. Harry Anglin, president of Clear-View and a resident of Martinsville. The minutes also show that Anglin was invited to meet with Council to discuss the problems but did not always appear. The Town Manager reported to Council in February of 1977 "that all efforts to contact Mr. Anglin . . . have been exhausted as he will not answer correspondence, nor will he accept any telephone calls made to him." The minutes further reflect that Anglin failed to provide an advertised telephone number for night and weekend service, made "unfilled promises" about improving repair service and picture quality, and failed to pro-

vide sufficient service personnel.

Finally, in August of 1980, Council decided to hold a special meeting pursuant to Section 26 of the franchise to consider passage of an ordinance "terminating and cancelling" the franchise. Notice for a September 15 hearing stated the grounds for the revocation to be that Clear-View had "violated provisions of said Franchise through fault and willfully" and had "attempted to evade provisions of the Franchise or [had] practiced fraud or deceit upon the Town."

Anglin appeared without counsel at the public hearing, which was conducted by the Town Attorney. According to the transcript of the Council meeting, a number of Town residents voiced complaints about the performance of Clear-View. Anglin actively participated in the hearing by responding to many of the citizens complaints and to questions from

members of Council. The subjects covered by the complaints included Clear-View's failure to provide prompt repair service, to improve poor picture quality, to respond to requests for service, to provide an advertised telephone number for contact by subscribers with the company, and to fulfill promises for improved service. During the hearing, Anglin was sarcastic, argumentative, and evasive when responding to legitimate questions.

At the conclusion of citizen participation, Anglin was afforded the opportunity to make additional comments to close the hearing. Following an executive session lasting 40 minutes, Council adopted the revocation ordinance, deciding Clear-View had violated the franchise. The ordinance provided, in part, that:

> "Council . . . finds the following facts after public hearing:

(1) That Clear-View Cable TV, Inc. has not rendered efficient service, made repairs promptly, or interrupted service only for good cause and for the shortest time possible.

(2) That Clear-View Cable TV, Inc. has not maintained sufficient employees to provide safe, adequate and prompt service for its facilities.

(3) That Clear-View Cable TV, Inc. has attempted to evade provisions of the franchise agreement with the Town of Narrows, Virginia."

After the ordinance was read publicly and after Anglin was reminded that Clear-View should cease operation in the Town of once, he stated that Council's action was not "legal." He said, "I will continue to operate as usual until it is proven in Court that I do not have the right to do so . . . ."

During the subsequent court hearings, the following documents, among others, were received as exhibits: Excerpts from the Council minute book, the transcript of

the Council meeting, and a 1980 Federal Communications Commission (FCC) system performance testing of the Town's CATV system, prepared by an independent consulting engineer who testified on behalf of Clear-View. Court testimony on behalf of the Town established essentially the same facts that had been presented during the public hearing.

Witnesses on behalf of Clear-View testified that its CATV system met or exceeded FCC technical standards, that there were approximately 950 subscribers to the Town's system, and that the market value of the system was "in the neighborhood of 450 to 500 thousand dollars." Clear-View also presented evidence that the poor performance of the system was due, for example, to electric power outages, breaks in cable due to motor vehicle accidents and falling tree limbs, unforeseen equipment failure, vandalism to

equipment, weather changes, and ineptness of the subscribers in adjusting their individual television sets. There was also evidence that if Clear-View's system was "turned off . . . today," six to nine months would elapse before another system could be installed to provide service to the Town. Clear-View offered further evidence to show that ongoing attempts had been made to respond promptly to requests for service and that great difficulty had been experienced in persuading qualified technicians to locate permanently in the community to service the equipment.

Within two weeks of the final hearing, the trial judge announced his decision in open court, finding in favor of Clear-View. The court was "impressed with the fact" of "a very definite conflict in personalities" between Anglin and Town officials. The judge noted that he

found no "specific objections to the operation by Clear-View," but stated there were "many general objections." The Court further observed there was no open discussion among Council after the executive session and said that if the findings of fact as stated in the ordinance "were actually made," it appeared to the court they were made during the closed session.

The trial judge further noted that only Clear-View presented evidence about the technical operation of the system and this evidence showed "that the equipment . . . . was average, nothing particularly sophisticated but that it was acceptable." The court commented on the "very drastic [mandamus] procedure" which could result in a forfeiture, noting the financial investment involved and the number of persons affected by termination of the franchise.

In conclusion, the trial court decided that the notice for the special Council meeting was vague, "more vague than the provisions of the franchise itself," that the "findings of fact as set forth in the [ordinance] . . . are conclusions and not findings of fact," that the action of Council "was very drastic, unreasonable, and arbitrary in that to have forced the action upon the citizens in the town would have been to deny those citizens of the town T.V. service," and that the whole matter "could have been handled without the drastic forfeiture proceeding that we have before us." The judgment order denying mandamus incorporated by reference the court's oral opinion.

The Constitution of Virginia, art. VII, § 9 and Code § 15.1-307 authorize cities and towns to grant, as well as to terminate, franchises to use public property. Code § 15.1-23.1 empowers the

governing body of any county, city, or town to franchise, tax, and regulate CATV systems. We are dealing here, of course, with the validity of an ordinance terminating a franchise, and not with an enactment that grants such a privilege.[3]

Municipal corporations are prima facie the sole judges of the necessity and reasonableness of their ordinances, and "the presumption of their validity governs unless it is overcome by unreasonableness apparent on the fact of the ordinance or by extrinsic evidence which clearly establishes the unreasonableness. This presumption is based upon the broad general principle that every intendment will be made in favor of the lawfulness of the exercise of municipal power." National Linen Service v. Norfolk, 196 Va. 277, 279, 83 S.E.2d 401, 403 (1954); see Repass v. Town of Richlands, 163 Va. 1112, 1115, 178 S.E. 3, 5 (1935).

Even though there is a presumption in favor of the propriety and validity of such legislative action, the judicial branch has the authority to declare the legislative acts void if the municipality's enactments are unreasonable, inconsistent with the general law and public policy, nonuniform in their operation, or destructive rather than promotive of lawful business and occupation. National Linen Service v. Norfolk, 196 Va. at 280,

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[3]For a review of cases involving the validity and construction of municipal ordinances regulating CATV service, see Annot., 41 A.L.R. 3d 384.

The parties actually do not disagree about application of the foregoing principles to this proceeding. The Town argues that the court "may review the Town's decision to determine if the process of decision was performed according to the law and the franchise agreement, was not reached in an arbitrary or capricious manner, or was the product of fraud or collusion." Clear-View says that "where a municipality seeks to revoke or cancel the franchise of its franchisee, it is a question of law for the court to decide whether the municipality acted reasonably, lawfully, and based its decision on facts drawn from competent evidence." Consequently, the basic question for the trial court, upon reviewing the legislative action, was to decide whether the action of the Town Council was reasonable.

The litigant attacking legislative

action as unreasonable has the burden to establish unreasonableness. Loudoun County v. Lerner, 221 Va. 30, 34, 267 S.E. 2d 100, 102 (1980). As we have stated in cases involving zoning ordinances, legislative action is reasonable if the matter in issue is fairly debatable. County of Fairfax v. Parker, 186 Va. 675, 680, 44 S.E.2d 9, 12 (1947). If the presumptive reasonableness of legislative action is challenged by probative evidence of unreasonableness, the challenge must be met by evidence of reasonableness. If such evidence of reasonableness is sufficient to make the issue fairly debatable, the legislative action must be sustained; if not, the evidence of unreasonableness defeats the presumption and the legislative act cannot be sustained. Fairfax County v. Snell Corp., 214 Va. 655, 659, 202 S.E.2d 889, 893 (1974).

Upon review of a trial court's

determination that a municipality's action in revoking a franchise was arbitrary and capricious, we accord the court's finding, as in the usual case, a presumption of correctness. We also, however, give full credit to the presumption of validity of the challenged legislative action and then, considering both presumptions, we examine the record to determine whether the evidence sustains the court's finding. See Fairfax County v. Pyles, 224 Va. 629, 638, 300 S.E.2d 79, 84 (1983).

Against this background, we examine Clear-View's argument in support of the judgment below. Initially, the company claims the trial court decided correctly that Council's findings were not findings of fact within the meaning of Section 26(b) of the franchise. We do not agree. Under these circumstances, factual findings of a municipal legislative body

are not required to meet the standards of the most efficient legal technician. Even though conclusory, the findings particularize the factual bases on which Council acted with sufficient clarity to advise the grantee about the grounds of revocation. Nothing more is required, and the trial court erred in finding to the contrary.

Next, Clear-View contends the trial court found correctly "that the Town Council acted arbitrarily, capriciously and unreasonably." That contention likewise is without merit. It is unnecessary to rehash the evidence presented during the Council meeting as opposed to that offered during the court hearings. While there was testimony presented by Clear-View that Council's action in terminating the franchise was unreasonable, nonetheless, there was abundant evidence presented to Council to support the

reasonableness of its action. We disagree with the trial court's observation that no specific objections to the operation by Clear-View were presented to Council. Sincere, vocal, and reasoned statements were made by numerous concerned citizens about Clear-View's deficiencies that extended over a period of at least four years. The citizens, as well as members of Council, related specific instances of inefficient service, dilatory conduct, and negligent performance by the president and employees of Clear-View, all in violation of the precise terms of the franchise.

When, as here, evidence of unreasonableness is met with evidence of reasonableness, a classic case of a "fairly debatable" issue is presented. Under these circumstances, it is the legislative body, and not the court, which has the prerogative to decide the issue. See

Fairfax County v. Jackson, 221 Va. 328, 335, 269 S.E.2d 381, 386 (1980). Because the issue is fairly debatable, the legislative judgment must stand. Thus, it follows that the trial court usurped the legislative prerogative in reversing Council's action. Id., 269 S.E.2d at 386. We have considered both operative presumptions and conclude that the trial court erred in deciding Council's action was unreasonable, arbitrary, and capricious.

Finally, Clear-View urges that the trial court was correct in finding that the notice given for the special meeting was vague. We also reject that argument. Notice was served personally on Anglin a month and a day before the scheduled hearing.[4] A notice also was published in a Giles County newspaper for four successive weeks prior to the hearing. It stated the time, date, and place of the

meeting and related the purpose: "to consider passage of an ordinance terminating and cancelling the franchise granted to Clear-View Cable TV, Inc."

4

"August 12, 1980

"TO: CLEAR-VIEW CABLE T.V. INC.
c/o Harry Anglin
1122 Corn Tassel Trail
Martinsville, Virginia

NOTICE

"Pursuant to Section 26 of an ordinance of the Town of Narrows effective January 1, 1976, 'An Ordinance Amending and Re-enacting a Franchise Granting Clear-View T.V. the Right to Use the Streets, etc. To Install and Operate a Community Antenna T.V. System in the Town', you are hereby notified that the Town Council of the Town of Narrows, Virginia, will, in a Special Meeting, on September 15, 1980, at 7:00 p.m. at the Town Hall, 131 Center Street in the Town of Narrows, Virginia, consider the passage of an ordinance terminating and cancelling your franchise and the foregoing ordinance, on the grounds that you have 1) violated provisions of said Franchise through fault and willfully; and, 2) attempted to evade provisions of the Franchise or have practiced fraud or deceit upon the Town.

"You are further notified that you are entitled to appear at the aforestated time and place and will be given an opportunity there and then to be heard

before the Town Council.

"This notice is hereby given pursuant to resolution of the Town Council of the Town of Narrows passed August 11, 1980.

TOWN OF NARROWS

By /s/Donald E. Richardson
Mayor

We hold the notice served on Anglin fully satisfied due process requirements of reasonableness. See Commission of Fisheries v. Hampton Roads Oyster Packers and Planters Ass'n, 109 Va. 565, 585, 64 S.E. 1041, 1048-49 (1909). The notice was timely and reasonably specific; it afforded Clear-View an opportunity to prepare a defense to the charges and informed the company of the subjects to be considered at the hearing. If Anglin was in doubt about the scope of the hearing, he had ample time to seek more specific information from the Mayor or Town Attorney. He testified he failed to do so, or to contact his own attorney for advice.

For these reasons, we will reverse the judgment of the trial court and remand the proceeding for entry forthwith of a writ of mandamus in accordance with the provisions of Code § 15.1-315 requiring

Clear-View to comply with the termination provisions of the franchise and the ordinance of revocation dated September 15, 1980.

Reversed and remanded.

A Copy,

Teste:

/s/ Allen L. Lucy

Clerk

VIRGINIA: IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON FRIDAY, THE 15TH DAY OF JUNE, 1984.

TOWN OF NARROWS, APPELLANT,

against Record No. 811452
Circuit Court No. 3752

CLEAR-VIEW CABLE TV, INC., APPELLEE.

UPON A PETITION FOR REHEARING

On consideration of the petition of the appellee to set aside the judgment rendered herein on the 27th day of April, 1984, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

s/Allen L. Lucy, Clerk

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

TOWN OF NARROWS,

Appellant, Record No. 811452

vs.

CLEAR-VIEW CABLE TV, INC.,

Appellee.

TO THE HONORABLE CHIEF JUSTICE AND THE JUSTICES OF THE SUPREME COURT OF VIRGINIA:

NOW COMES Appellee, Clear-View Cable TV, Inc., by counsel, pursuant to Rule 5:56 of the Rules of Court of the Supreme Court of Virginia and respectfully gives notice that it proposes to seek and will seek a writ of certiorari from the Supreme Court of the United States in this case and Clear-View Cable TV, Inc., doth respectfully move this Honorable Court and request this Honorable Court to defer the issuance of its mandate until proceedings in the Supreme Court of the United States

have been terminated. This motion is filed within fifteen (15) days of the date of denial of petition for re-hearing, which denial was on June 15, 1984.

Respectfully submitted this 18th day of June, 1984.

CLEAR-VIEW CABLE TV, INC.

By s/Philip G. Gardner
Counsel

Philip G. Gardner, Esq.
GARDNER, GARDNER & BARROW, P.C.
10 N. Bridge Street
P.O. Box 552
Martinsville, VA 24114-0552
703-638-2455

CERTIFICATE

This is to certify that a true copy of the foregoing pleading was this day mailed to James E. Cornwell, Jr., Esq., Tazewell Street, Pearisburg, Virginia 24134, counsel for Appellant.

s/ Philip G. Gardner
Counsel

6-18-84
Dated

VIRGINIA: IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON THURSDAY, THE 12TH DAY OF JULY, 1984.

TOWN OF NARROWS, Appellant,

against Record No. 811452
Circuit Court No. 3752

CLEAR-VIEW CABLE TV, INC.,

ORDER DEFERRING ISSUANCE OF MANDATE

Upon consideration of the application of the appellee, by counsel, praying that issuance of the mandate in this case be deferred in order that it may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of thisCourt, it is now ordered that issuance of the mandate of this Court in this case be, and the same is hereby, deferred, to and including the 13th day of September, 1984, on the expiration of which time the same may be

issued unless the case has been before that time docketed in the Supreme Court of the United States, in which event issuance thereof shall be deferred until the final determination of the case by that Court.

A Copy,

Teste:

s/Allen L. Lucy, Clerk

V I R G I N I A:

IN THE CIRCUIT COURT

FOR THE COUNTY OF GILES

TOWN OF NARROWS,

PLAINTIFF

VS.

CLEAR-VIEW CABLE TELEVISION,

DEFENDANT

MARCH 9, 1981
2:00 P. M.

HEARD BEFORE:

THE HONORABLE ROBERT L. POWELL

APPEARANCES:

WARREN, CORNWELL & GIBB, P.C.
Narrows, Virginia

By: James E. Cornwell, Jr., Esq.

Counsel on Behalf of Plaintiff
Town of Narrows

GILMER, SADLER, INGRAM, SUTHERLAND & HUTTON, ESQS.
Blacksburg, Virginia

By: Thomas J. McCarthy, Esq.
Phillip M. Sadler, Esq.

DILLOW & STAFFORD, ESQS.
Pearisburg, Virginia

By: J. Livingston Dillow, Esq.
C. Jefferson Stafford

Counsel on Behalf of Defendant
Clear-View Cable TV

(THE COURT SWEARS THE COURT REPORTER)

THE COURT:

DO YOU HAVE ANY COMMENT?

MR. CORNWELL:

No, sir.

MR. SADLER:

No, sir.

THE COURT:

THIS MATTER IS BEFORE THE COURT ON THE PETITION FOR A WRIT OF MANDAMUS FILED BY THE TOWN OF NARROWS AGAINST CLEARVIEW CABLE T.V.

AN ANSWER WAS FILED TO THAT PETITION AND THERE WAS ALSO A SUIT FOR A TEMPORARY RESTRAINING ORDER SEEKING TO RESTRAIN THE TOWN FROM TAKING CERTAIN ACTION UPON CRIMINAL WARRANTS THAT WERE SWORN OUT AGAINST THE RESPONDENT IN THE MANDAMUS PROCEEDING.

CLEARVIEW CABLE HAD OPERATED A FRANCHISE IN THE TOWN OF NARROWS FOR SEVERAL YEARS, AND IN 1976 THE FRANCHISE

WAS RENEWED AND AT THAT TIME A RAISE IN RATE WAS GRANTED TO CLEARVIEW. APPARENTLY AFTER MANY COMPLAINTS CLEARVIEW WAS GIVEN A NOTICE THAT THE TOWN OF NARROWS WOULD HOLD A MEETING TO DETERMINE WHETHER OR NOT TO CANCEL THE FRANCHISE UNDER WHICH CLEARVIEW WAS OPERATING. NOTICE WAS MAILED TO CLEARVIEW STATING THE GROUNDS TO BE CONSIDERED AT THIS MEETING AS:

(1) THAT CLEARVIEW VIOLATED PROVISIONS OF THE SAID FRANCHISE THROUGH FAULT AND WILLFULLY: AND

(2) THAT CLEARVIEW ATTEMPTED TO EVADE PROVISION OF THE FRANCHISE OR HAD PRACTICED FRAUD OR DECEIT UPON THE TOWN.

THAT MEETING WAS HELD AT THE TOWN HALL IN NARROWS, A REPRESENTATIVE OF CLEARVIEW WAS PRESENT. AT THAT MEETING, THE MAYOR STATED THE PURPOSE OF

THE MEETING TO BE TO GIVE MR. ANGLIN OF CLEARVIEW A CHANCE TO EXPLAIN TO US WHY WE SHOULD NOT TERMINATE HIS CONTRACT. NO SPECIFIC OBJECTIONS WERE STATED TO HIM AT THAT TIME, AND THE MEETING PROCEEDED WITH SEVERAL RESIDENTS OF THE TOWN BEING PRESENT. IN THE COURSE OF THAT MEETING FROM THE RECORD THAT HAS BEEN PRESENTED TO THE COURT TWELVE CITIZENS VOICED COMPLAINTS AGAINST CLEARVIEW. THERE WERE SOME CITIZENS WHO WERE OUTSIDE OF THE CORPORATE LIMITS THAT VOICED COMPLAINTS AND THERE WERE OTHER CITIZENS WHO HAD NO COMPLAINTS.

IN THE COURSE OF THE MEETING, ONE MEMBER OF THE COUNCIL STATED OBJECTIONS TO CLEARVIEW AND THEN MADE THE STATEMENT THAT SHE HAD STARTED THE MEETING SO NOW THE PEOPLE COULD HAVE THEIR MEETING. AND, LATER IN THE COURSE

OF THE MEETING STATED THAT IF THE MAJORITY OF THE PEOPLE WANTED THE SERVICE THAT WAS WHAT THEY WOULD GET; WHICH MAY INDICATE TO THE COURT THEY STARTED OFF THE MEETING WITH THE IDEA THAT A MAJORITY OF THE CITIZENS IN THE TOWN MIGHT CONTROL THE OUTCOME OF THE MEETING.

AFTER THE MEETING, DURING WHICH THERE APPARENTLY WERE SOME RATHER HEATED WORDS. THE SITUATION BECAME SO HEATED THE TOWN ATTORNEY, WHO MODERATED THE MEETING, ASKED THE PEOPLE TO CONDUCT THEMSELVES PROPERLY. DURING THAT MEETING, THE TOWN MANAGER FOR THE TOWN OF MARROWS PARTICIPATED WITH SOME REMARKS AND MR. ANGLIN OF CLEARVIEW PARTICIPATED WITH REMARKS.

THE COURT IS IMPRESSED WITH THE FACT THAT FROM STATEMENTS MADE IN THE MEETING AND IN THE ORE TENUS

HEARINGS THERE IS A VERY DEFINITE CONFLICT IN PERSONALTIES IN THE DEALINGS THAT HAVE GONE ON FOR THE PERIOD OF TIME THAT CLEARVIEW HAS OPERATED IN THE TOWN OF NARROWS. THE COURT IS IMPRESSED SOMEWHAT WITH THE FACT THAT CLEARVIEW WAS GRANTED AN INCREASE IN RATE IN 1976 IN SPITE OF THE FACT THAT THERE WERE COMPLAINTS AT THAT TIME. IN 1976, CLEARVIEW WAS GRANTED A NEW FRANCHISE. AT THE CLOSE OF THE PUBLIC MEETING, THE TOWN COUNSEL WITHDREW INTO A CLOSE SESSION AND AFTER COMING BACK INTO THE REGULAR SESSION; THE MOTION WAS MADE IMMEDIATELY TO TERMINATE THE FRANCHISE. IN READING THE RECORD OF THAT MEETING THE COURT HAS NOT FOUND ANY SPECIFIC OBJECTIONS TO THE OPERATION BY CLEARVIEW. THERE ARE MANY GENERAL OBJECTIONS. IN THE

EVIDENCE THAT HAS BEEN PRESENTED TO THE COURT SINCE THAT MEETING IN OUR ORE TENUS HEARINGS IT HAS BEEN SHOWN THAT THERE ARE SOME NINE HUNDRED FITY (950) CUSTOMERS OF CLEARVIEW, IN AND SURROUNDING THE TOWN OF NARROWS.

IF THE FINDINGS OF FACT AS STATED BY THE COUNCIL IN ITS MOTION TO TERMINATE THE FRANCHISE WERE ACTUALLY MADE IT WOULD APPEAR TO THE COURT THAT THEY WERE MADE IN A CLOSED SESSION AND NOT IN THE OPEN SESSION BECAUSE WHEN THE COUNCIL RETURNED FROM THE CLOSED SESSION THERE WAS NO DISCUSSION. THE RECORD DOESN'T DISCLOSE ANY COMMENT BY ANY MEMBER OF COUNSIL EXCEPT THE READING OF THE MOTION TO TERMINATE THE FRANCHISE. THOSE FINDINGS OF FACT STATED THAT:

1. CLEARVIEW CABLE T.V., INCORPORATED HAS NOT RENDERED EFFICIENT

SERVICE, MADE THE REPAIRS PROPERLY OR INTERRUPTED SERVICE ONLY FOR GOOD CAUSE AND FOR THE SHORTEST TIME POSSIBLE.

2. THAT CLEARVIEW CABLE T.V., INCORPORATED HAS NOT MAINTAINED SUFFICIENT EMPLOYEES TO PROVIDE SAFE, ADEQUATE AND PROMPT SERVICE FOR ITS FACILITIES.

3. THAT CLEARVIEW CABLE T.V. HAS ATTEMPTED TO EVADE PROVISIONS OF THE FRANCHISE AGREEMENT WITH THE TOWN OF NARROWS, VIRGINIA.

THIS COURT IS UNABLE TO FIND IN THE RECORD OF THAT MEETING ANY SPECIFIC FINDINGS OF FACT TO SUPPORT THESE GENERAL CONCLUSIONS.

AFTER THE MOTION WAS MADE AND PASSED, THE ATTORNEY FOR THE TOWN, WHO ACTED AS MODERATOR FOR THE MEETING, READ TO MR. ANGLIN OF CLEARVIEW THE PENALTY PROVISIONS THAT MIGHT APPLY IF HE

CONTINUED TO OPERATE. IT WAS SUBSEQUENT TO THAT MEETING THAT IN A SHORT TIME TWO ARREST WARRANTS WERE SWORN OUT. THERE HAVE BEEN TWO ORE TENUS HEARINGS BEFORE THE COURT DURING WHICH TIME CLEARVIEW PRESENTED EVIDENCE ABOUT THE TECHNICAL OPERATION OF THE CABLE T.V. AND THAT HAS BEEN THE ONLY EVIDENCE THAT HAS BEEN PRESENTED. THERE IS NOTHING IN THE RECORD TO INDICATE THAT THE TOWN EVER CONSIDERED ANY ENGINEERING STUDIES OR ANY OF THE EVIDENCE ABOUT THE TECHNICAL OPERATION OF CLEARVIEW.

THE COURT IS LED TO ONLY ONE CONCLUSION AND THAT IS THAT THE ACTION TAKEN WAS TAKEN ON THE EVIDENCE OF THE CITIZENS OF THE TOWN WHO CAME IN AND COMPLAINED AT THAT MEETING. AT THE ORE TENUS HEARINGS, EVIDENCE WAS INTRODUCED THAT THERE HAD BEEN COMPLAINTS

EXTENDING BACK OVER A PERIOD OF TIME. THERE IS NOT ANY EVIDENCE OF DEALING WITH THE TECHNICAL OPERATION OF A CABLE T.V. EXCEPT THAT OF CLEARVIEW ITSELF; AND THAT EVIDENCE SHOWED THAT THE EQUIPMENT OF THE OPERATION WAS AVERAGE, NOTHING PARTICULARLY SOPHISICATED BUT THAT IT WAS ACCEPTABLE.

THE COURT HAS URGED COUNSEL TO GET THEIR RESPECTIVE CLIENTS TO TRY TO SETTLE THIS MATTER AND TAKE AN OBJECTIVE LOOK AT THE EVIDENCE UP TO THAT POINT AND TRY TO WORK OUT SOME WAY TO SETTLE THIS CONTROVERSY RATHER THAN HAVING THE COURT TO DO IT. EVEN TO THIS DAY, THE COURT HAS SUGGESTED THAT AVENUE, BUT THE FAILURE OR THE REFUSAL ON THE PART OF ANY TO NEGOTIATE FURTHER CONFIRMS THAT THE PERSONALITY CONFLICT THAT EXIST IS STILL A MAJOR

PROBLEM IN THIS CASE.

WE ARE DEALING IN THIS CASE WITH A PETITION FOR A WRIT OF MANDAMUS WITH A FORFEITURE, WHICH IS A VERY DRASTIC PROCEDURE IN LAW. WE HAVE EVIDENCE BEFORE THE COURT THAT THE FINANCIAL INVESTMENT IN CLEARVIEW'S OPERATION IN THE TOWN OF NARROWS MAY APPROACH $250,000.00. THE EFFECT OF THE ACTION OF THE TOWN COUNCIL THE NIGHT OF THE PUBLIC HEARING WOULD BE TO CLOSE THAT OPERATION IMMEDIATELY, FORCING A RIGHT SUBSTANTIAL LOSS TO CLEARVIEW. THIS COURT, AS WITH ANY COURT, MUST FACE THE FACT THAT A FORFEITURE IS RATHER DRASTIC AND BECAUSE OF IT THE COURT MUST SEE THAT ANY AND ALL PERSONS' RIGHTS WOULD BE PROTECTED.

THIS COURT FINDS THAT THE NOTICE GIVEN CLEARVIEW WAS VAGUE, MORE

VAGUE THAN THE PROVISIONS OF THE FRANCHISE ITSELF. THE COURT FURTHER FINDS THAT THE FINDINGS OF FACT AS SET FORTH IN THE MOTION BY THE COUNCIL ARE CONCLUSIONS AND NOT FINDINGS OF FACT. THE COURT FURTHER FINDS THAT THE ACTION TAKEN BY THE COUNCIL AFTER THE PUBLIC MEETING WAS VERY DRASTIC, UNREASONABLE, AND ARBITRARY IN THAT TO HAVE FORCED THE ACTION UPON THE CITIZENS IN THE TOWN WOULD HAVE BEEN TO DENY THOSE CITIZENS OF THE TOWN T.V. SERVICE. IT APPEARS THAT NO THOUGHT WAS GIVEN TO THAT. IT APPEARS THAT NO THOUGHT WAS GIVEN TO THE EFFECT ON CLEARVIEW OF AN IMMEDIATE SHUTDOWN. IN ARGUMENT AT ONE OF OUR ORE TENUS HEARINGS COUNSEL USED THE WORD, DEATH SENTENCE, USED THAT TERM, AND IT MIGHT BE LIKENED TO THAT. WE ARE DEALING IN THIS CASE WITH A MANDAMUS

AND THE COURT FEELS THAT A MANDAMUS, COULD HAVE BEEN RESORTED TO FOR THE PURPOSE OF COMPELLING COMPLIANCE WITH ANY DEFAULT IN THE TERMS OF THE FRANCHISE; AND IT APPEARS TO THE COURT THAT WOULD BE THE REASONABLE AND PROPER COURSE TO TAKE. WE COULD HAVE HAD HEARINGS AND MADE FINDINGS OF WHERE THE SHORTAGE IN SERVICE MIGHT BE AND THIS MATTER COULD HAVE BEEN HANDLED WITHOUT THE DRASTIC FORFEITURE PROCEEDING THAT WE HAVE BEFORE US.

SO UPON THE CONSIDERATION OF THE RECORD OF THE TRANSCRIPT OF THE PUBLIC HEARING, UPON THE EVIDENCE TAKEN AT ORE TENUS HEARINGS BEFORE THIS COURT, UPON CONSIDERATION OF THE ARGUMENTS OF COUNSEL AND BEING MINDFUL OF THE FACT THAT THE COURT IS VERY HESITANT TO STEP INTO THE WORKINGS OF ANY MUNICIPAL COUNCIL, IT IS THE

JUDGMENT OF THIS COURT THAT THE PETITION FOR A WRIT OF MANDAMUS BE DENIED.

MR. SADLER:

We will prepare the order, if it pleases the Court, Your Honor.

THE COURT:

I THINK THAT IS ALL RIGHT.

MR. CORNWELL:

Your Honor, respectfully I am not familiar with the appeal procedure upon a mandamus, I was wondering about the bond, what bond would be required, if any?

THE COURT:

WE CAN DISCUSS THAT.

MR. CORNWELL:

Thank you. Your Honor.

****

STATE OF VIRGINIA

COUNTY OF GILES, TO-WIT:

I, Scarlet J. Buckland, a Deputy Clerk, designated and appointed to report this case, do hereby certify that I was duly sworn; that the proceedings herein were taken in Gregg shorthand and by Electronic Machine and accurately transcribed to the best of my ability, and that this transcription is a true and correct transcript of the evidence and other incidents of the trial terein, all questions raised and all rulings thereon exceptions noted in the case of Town of Narrows vs. Clear-view Cable Television, hearing in the Circuit Court of Giles County, Virginia, at Pearisburg, Virginia on Marcy 9, 1981, commencing at 2:00 P.M. on said date.

GIVEN under my hand this 21st day of May, 1981.

s/ Scarlet J. Buckland

Court Reporter

FINAL ORDER

This cause came on this day to be heard upon agreement of counsel; upon hearings previously had in this matter, and upon opinion of the Court given on March 9, 1981.

For the reasons stated by the Court on March 9, 1981, the petition for writ of mandamus is hereby denied.

And to all of which the plaintiff, the Town of Narrows, by counsel, duly excepted and objected and noted its intention to appeal said decision to the Supreme Court of Virginia.

It is further ADJUDGED and ORDERED that all transcripts of hearings had herein, whether previously filed herein or which are to be filed hereafter, including exhibits, be, and they hereby are, made a part of the record in this matter.

Enter this ORDER this 29th day of June, 1981.

s/ Robert L. Powell
Judge

Requested:

s/ Benjamin R. Gardner
Counsel for Defendant

Benjamin R. Gardner
Gardner & Gardner
10 N. Bridge Street
Martinsville, Virginia 24112

Requested:

s/ J. Livingstone Dillow

J. Livingstone Dillow
Dillow & Stafford
Giles Professional Building
Pearisburg, Virginia 24134

Requested:

s/ Philip M. Sadler

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Gilmer, Sadler, Ingram,
Sutherland & Hutton
65 East Main Street
Pulaski, Virginia 24301

Requested:

s/Thomas J. McCarthy, Jr

Thomas J. McCarthy, Jr.
Gilmer, Sadler, Ingram,
Sutherland & Hutton
65 East Main Street
Pulaski, Virginia 24301

Seen and Objected to:

s/ James E. Cornwell, Jr.
Counsel for Plaintiff

Warren, Cornwell & Gibb, P.C.
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Narrows, Virginia 24124

A TRUE COPY TESTE:

s/ Ted J. Johnson, Jr.,
Clerk
Circuit Court of Giles
County.

Office-Supreme Court, U.S.
FILED
OCT 5 1984
ER L. STEVAS,
CLERK

NO. 84-408

IN THE

Supreme Court of the United States

OCTOBER 1984 TERM

CLEAR-VIEW CABLE, T.V., INC.
APPELLANT

v.

TOWN OF NARROWS,
APPELLEE

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

MOTION TO DISMISS

COUNSEL FOR APPELLEE
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I. QUESTIONS PRESENTED BY THIS MOTION

Your Appellee herein, the Town of Narrows, respectfully moves this Honorable Court to dismiss the appeal of this cause upon the following grounds:

1. THAT THE APPELLANT HAS NOT COMPLIED WITH THE RULES OF THE UNITED STATES SUPREME COURT, SPECIFICALLY RULE 10 AS IT PERTAINS TO THE REQUIRED NOTICE OF APPEAL.

2. THAT THE APPEAL DOES NOT INVOLVE A SUBSTANTIAL FEDERAL QUESTION.

3. THAT THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NOT TIMELY OR PROPERLY RAISED IN THE SUPREME COURT OF VIRGINIA AND WAS NOT EXPRESSLY PASSED ON.

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STATEMENT OF THE CASE

References in parentheses are to the page number of the Appendix in the Virginia Supreme Court. This appendix is a part of the record in the Supreme Court of Virginia.

Clear-View Cable T.V., Inc. had been operating a cable T.V. system in the Town of Narrows for a number of years, at first as a successor to and assignee of Giles TV Cable, Inc. who had been granted a franchise on April 9, 1968 (App. I) and later pursuant to its own franchise which had been granted by an ordinance to be effective January 1, 1976 (App. 9). Both franchise ordinances provided the following language:

> Section 26-Forfeiture of Franchise: A. In addition to all other rights and powers pertaining to the Town by virtue of this franchise or otherwise, the Town reserves the

right to terminate and cancel this franchise and all rights and privileges of the grantee hereunder in the event that the grantee:

(1) Violates any provision of this Franchise or any rule, order or determination of the Town or Town Council made pursuant to this Franchise, except where such violation, other than of Section 21 or subsection (2) below, is without fault or through excusable neglect;

(2) Becomes insolvent, unable or unwilling to pay its debts, or is adjudged a bankrupt;

(3) Attempts to dispose of any of the facilities or property of its CATV business to prevent the Town from purchasing the same as provided for herein;

(4) Attempts to evade any of the provisions of this Franchise or practices any fraud or deceit upon the Town;

b. Such termination and cancellation shall be by ordinance duly adopted after thirty (30) days notice to the grantee and shall in no way affect any of the Town's rights under this Franchise or any provision of law. In the event that such termination and cancellation depends upon a finding of fact such finding of fact as made by the Town Council or its representative shall be conclusive. Provided, however, that

before this Franchise may be terminated and cancelled under this Section, the grantee must be provided with an opportunity to be heard before the Town Council.

There had been various complaints concerning the operation and reception of the signal from the cable system. After various complaints by many people within the town limits of the Town of Narrows, and others who were connected with the system, Council decided that some action must be taken to either improve the system or to declare that Clear-View Cable T.V., Inc. was in violation of Section 9A of the original franchise ordinance. Section 9A provided as follows:

> The grantee shall render efficient service, make repairs promptly and interrupt service only for good cause and for the shortest time possible. Such interruptions, insofar as possible, shall be preceded by notice and shall occur during periods of minimum use of the system.

On September 15, 1980, the Town Council of the Town of Narrows called a special meeting to consider action on the franchise. Notice of this meeting was served upon the President of Clear-View Cable TV, Inc. thirty (30) days prior to the meeting as required in the franchise agreement. The meeting was properly called to order and all Council members were present along with the Mayor, Town Manager, Secretary and the Town Attorney. Clear-View Cable TV, Inc. appeared by and was represented by Harry Anglin, its President. In the Town meeting, various citizens were recognized and allowed to state their complaints concerning the service rendered by the cable company. Mr. Anglin was allowed rebuttal time at the end of each speaker and at the end of the

meeting as a whole. As the Virginia Supreme Court found at Page 5 of its opinion, Mr. Anglin was "sarcastic, argumentative, and evasive when responding to legitimate questions."

Upon motion by Councilman Plummer, duly seconded and passed unanimously, the Council passed an ordinance revoking and terminating the franchise of Clear-View Cable TV, Inc. for the reasons as set forth in that ordinance which appears in the appendix (App. 145). The entire transcript of the public hearing is also in the Appendix at Page 52.

The remaining actions pertaining to the legal process are as set forth in the statement of the case by the Appellant. The Supreme Court of Virginia did award the Town a writ of err-

or to the decision of the Circuit Court of Giles County denying the petition for writ of mandamus and on April 27, 1984 reversed the Circuit Court judgment and directed the Circuit Court of Giles County to issue the mandamus prayed for by the Town.

The Town had argued in both the Circuit Court of Giles County and the Supreme Court of Virginia that its actions were done pursuant to the franchise ordinance and the right of forfeiture retained by the Town for violation of a condition thereof. Both the Town and Clear-View argued before the Supreme Court concerning the action of the Town. The Court quoted from the Clear-View brief at Page 9 of its opinion the following rule of law submitted by Clear-View:

> Where a municipality seeks to revoke or cancel the franchise of its franchisee, it is a question of law for the Court to decide whether the municipality acted reasonably, lawfully and based its decision on facts drawn from competent evidence.

The Town argued in its brief, also quoted on Page 9 of the Court's opinion, the following:

> The Court may review the Town's decision to determine if the process or decision was performed according to the law and the franchise agreement, was not reached in an arbitrary or capricious manner, or was a product of fraud or collusion.

As the Court set forth in Page 9 of its opinion, both Clear-View and the Town of Narrows agreed as to the application of law to the proceeding before the Supreme Court of Virginia.

ARGUMENT

1. THAT THE APPELLANT HAS NOT COMPLIED WITH THE RULES OF THE UNITED STATES SUPREME COURT, SPECIFICALLY RULE 10 AS IT PERTAINS TO THE REQUIRED NOTICE OF APPEAL.

The purported notice of appeal is set forth on page 49 of the Appellant's Appendix to his Jurisdictional statement. Rule 10 provides that such notice specify the parties taking the appeal, the judgment or part thereof appealed from, giving the date of its entry and specify the statute or statutes under which the appeal to this Court is taken.

It is plain that the purported notice of appeal fails to comply with this rule either in form or substance. The notice to the Court indicates

Appellee's intention to seek a writ of certiorari from this Court. It, by its express terms, is not a notice of appeal

The notice fails to advise the judgment or part thereof being appealed from or give the date of its entry. Indeed from a reading of the notice, it can be reasonably concluded the order involved is the order denying the petition for re-hearing.

Most importantly, the notice fails to specify the statute or statutes under which the appeal to this Court is taken. The appellee indicates that the jurisdiction for appeal is based on 28 U.S.C. §1257 and Article I, Section 10 of the United States Constitution. No statement to that effect was included in the notice as required by Rule 10 of this Court. It is submitted that the notice filed was given to avoid the mandate to

be handed down by the Supreme Court of Virginia requiring the Appellant to cease operations so as to prolong this litigation and continue the Appellant's operation. This Court has previously held that it will not consider argument not made in state court below and not reserved in the notice of appeal. Head v. New Mexico Board of Examiners of Optometry (1963) 374 U.S. 424, 108 2d 983, 83 S. Ct. 1959.

2. THAT THE APPEAL DOES NOT INVOLVE A SUBSTANTIAL FEDERAL QUESTION.

The Appellant contends that the questions he presents are substantial because of its contention that the Virginia Supreme Court applied the wrong level of scrutiny to the basis for the revocation of the franchise. The Appellant proposes that by deciding this matter this Court would clarify the

level of scrutiny required and the kind of factual basis necessary to allow a municipality to cancel a franchise. The Appellant ignores that the ordinance granting the franchise and which it claims constitutes a contract, expressly governs the cancellation of the franchise.

The issue in this case before the Supreme Court of Virginia concerned the operation of that reserved power to the Town. The parties before that Court as indicated in that Court's opinion on Page 43 of the Appellant's appendix had no disagreement on the standard to govern the municipalities actions. The Appellant now contends the Court should have used a different standard.

The issue of termination of franchise rights was considered by this Court in the 1935 decision of Public Service

Commission of Puerto Rico v. Havemeyer, 296 U.S. 506, 80 L. Ed. 357. The situation involved therein was the revocation of a franchise pursuant to an implied power to revoke due to the failure of the franchise to comply with a duty voluntarily contracted by them in accepting the franchise. The Court upheld that revocation by its language at 296 U.S. 515:

> Implied in every grant of franchise is the condition that it may be lost by misuse. Every such special privilege is subject to termination for breach of condition, whether express or implied, upon which the grant depends. It may be cancelled or withdrawn by any procedure that is not repugnant to the established principles of justice. The initial step need not be a suit for mandamus, quo warranto, injunction or the like. Essential requirements are satisfied if the withdrawal of the privilege, declared by legislative or executive authority, may be followed by appeal to a Court of compentent jurisdiction in which the rights of the holders may be determined.

The cancellation involved in the franchise granted to the Appellant differs from that considered in Havemeyer, most importantly in that the right to revoke the same was expressly reserved and the method of revocation was plainly set forth in the franchise agreement with the Appellant.

The Appellant relies on three more recent cases of this Court to support its contention that the Virginia Court used the wrong standard to judge the action of the Town of Narrows. None of these cases involve franchise agreements between public bodies and private entities or cancellation thereof. The cases are plainly distinguishable to the issues herein involved.

In the matter now being argued, the municipality owns the property over which the right was granted, in trust

for the public. The Appellant contends that the franchise issued by the Town was a contract. The Appellee not only concedes that the franchise is a contract but relies upon that argument to uphold the cancellation thereof.

3. THAT THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WAS NOT TIMELY OR PROPERLY RAISED IN THE SUPREME COURT OF VIRGINIA AND WAS NOT EXPRESSLY PASSED ON.

The Appellant claims in his jurisdictional statement that the impairment of contract issue was raised in the Supreme Court of Virginia and points to his brief before said Court on Pages 17 and 18. A review of Page 17 and 18 of the Appellant's brief before the Supreme Court of Virginia indicates that the only language discussing the same concerns a discussion of the case of The

City of Los Angeles v. Los Angeles Gas and Electric Corp., 251 U.S. 32, 40 Supreme Court 76, (1919), wherein the case was synopsized as it pertains to the situation therein in which the City Council of Los Angeles took action concerning the electric corporation's franchise agreement. The purpose of this case as cited and the quotation taken from the case was for the purpose of demonstrating to the Court that a franchise agreement is a contract and not for the purpose of raising the issue that the Town of Narrows did violate the constitutional amendment prohibiting impairment of contracts. The appendix in the Supreme Court includes a copy of the answer of Clear-View Cable TV, Inc. to the petition for writ of mandamus by the Town of Narrows filed in the Circuit Court of Giles County.

Nowhere in that answer is the impairment of the contract theory raised before the Circuit Court of Giles County. Before that, on Page 44 of the Appendix, the Bill for injunctive relief filed by Clear-View Cable TV, Inc. against the Town of Narrows is printed. Again, no impairment of contract theory is raised in the Circuit Court of Giles County. Both the Appellant and the Appellee briefed the Supreme Court of Virginia on the applicable law and questions pres ented to the Court. The questions presented are listed on Page 6 of the Appellant's brief and Page 2 of the Appellee's brief, and in neither place was the impairment of contract theory listed as a issue on appeal to the Court.

The strongest argument that the Appellant has that he raise the impair-

ment theory is the language in his brief on Page 19. This language is within the section of the Appellant's brief which argues the question of whether the Circuit Court of Giles County properly reviewed the decision of the Council of the Town of Narrows, Virginia to terminate the franchise agreement. The Appellee had raised the issue that the actions of the Town Council of the Town of Narrows were legislative actions and, therefore, not subject to judicial review unless arbitrary capricious or unreasonable, citing to the Court the Havemeyer case for that proposition. This is the only place in any documents submitted to the Court where the issue of impairment of contract

theory is raised, and then it is simply referred to but not argued. The issue was never raised or mentioned in the opinion of Virginia Supreme Court or in the order of the Circuit Court of Giles County.

The Supreme Court of the United States has consistently held that it:

> ...will not decide federal constitutional issues raised here for the first time on review of State Court decisions.

Cardinale v. Louisiana 394 U.S. 437, 438 (1968).

In Tacon v. Arizona 410 U.S. 351, 352 (1973), this Court stated, in dismissing the writ of certiorari as improvidentally granted, "that it appears that these broad issues were not raised by the petitioner below or passed upon by the Arizona Supreme Court. We cannot decide issues raised for the first time

here." The cases are consistent with this decision in Honeyman v. Hanan, 300 U.S. 14, 18-19 (1937), that it "...must appear affirmatively from the record, not only that the federal question was presented to the highest Court of this state having jurisdiction but that its decision of the federal question was necessary to the determination of the cause."

More recently, this Court has reiterated this question, in holding that it was without jurisdiction to grant certiorari, where the Georgia Supreme Court had failed to rule on the federal issue raised by the petitioner there, as follows:

> At the minimum, however, there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were

> apprised of the nature or substance of the federal claim at the time and in the manner required by the state law. Otherwise, we cannot be sufficiently sure when the state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court.

Webb v. Webb, 451 U.S. 493, 502 (1981).

The record in this case fails to show that the appellant herein affirmatively raised the issue of impairment of contract or that there was an explici and timely insistence by the appellant in the state court that this action by the Town Council of the Town of Narrows impaired the contractual agreement in effect between the Town of Narrows and the Appellant. The mere fact that it was mentioned in passing in the argument of whether or not there existed a contract between the parties hereto

should not be considered by this Court as having raised the issue in such manner that the Supreme Court of Virginia resolved the issue against the appellant.

Indeed, the Virginia Supreme Court, in its opinion as previously quoted on Page 9 thereof, sets forth the issue before the Supreme Court of Virginia and the parties positions thereon.

> The parties actually do not disagree about an application of the foregoing general principles of this proceeding. The Town argues that the Court may review the Town's decision to determine if the process of decision was performed according to the law and the franchise agreement, was not reached in an arbitrary or capricious manner, or was the product of fraud or collusion."Clearview says that where a municipality seeks to revoke or cancel the franchise of its franchisee, is a question of law for the Court to decide whether a municipality acted reasonably, lawfully and based its decision on facts drawn from competent evidence. Consequently, the basic question for the trial Court, upon review-

ing the legislative action, was to decide whether the action of the Town Council was reasonable.

It is plain from the record before the Circuit Court of Giles County and the Supreme Court of Virginia that the Appellant herein did not raise the issue of impairment of contract so as to properly set before this Court that issue for determination. The issue before both Courts was the issue of whether or not, under the facts and law, the action of the Town Council was reasonable pursuant to the facts or whether it was reached in an arbitrary or capricious manner. The Supreme Court found, on the facts of this case, that the decision was reasonable and proper and that Court's decision should not be reversed.

CONCLUSION

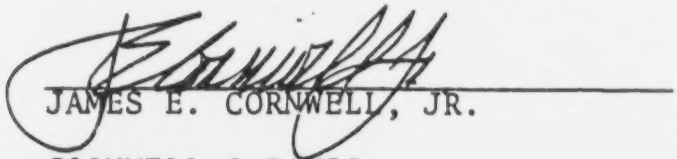
For all the above reasons, including failure of the Appellant to comply with the rules of this Court, for lack of a substantial federal question and failure of the Appellant to timely or properly raise the issue now presented in the state courts, the Appellee respectfully moves this court to dismiss this proported appeal.

CERTIFICATE OF SERVICE

This is to certify that in accordance with Rule 28 of the Rules of the Supreme Court, I have on this day served the required three (3) copies of the Motion to Dismiss by depositing same in a United States Mail box with First-Class postage prepaid and addressed to the following attorney for Appellant:

Philip G. Gardner, Esq.
Gardner, Gardner & Barrow
10 N. Bridge Street
P. O. Box 552
Martinsville, VA 24114-0552

This 4th day of October, 1984.



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